



## **THE DIFFERENCE OF A CHILD (WALAD) CONCEPT IN ISLAMIC INHERITANCE LAW AND ITS IMPLICATIONS ON THE DECISIONS OF THE RELIGIOUS COURTS IN INDONESIA**

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### **Abstract**

*This article is based on the fact that there is still the disparity of decisions among the Religious Court Judges on heirs, especially a child (walad), when handling the inheritance disputes. This is because there is a general provision of the meaning of walad contained in the Indonesian Compilation of Islamic Law (KHI) in which it includes both a son and a daughter. In addition, there is no obligation for Religious Court Judges to use the KHI as the basis for legal considerations, allowing for some Religious Court Judges to use the classical Islamic Jurisprudence (fiqh) as the legal basis in deciding a case. This article aims to investigate the impact of the general concept of walad (a child) and measures should be taken the Government to accommodate the legal reference material for Religious Court*

*Judges, especially the KHI and the classical Islamic Jurisprudence (fiqh). It employs normative legal research which primarily examines the decisions of the Religious Courts in East Kalimantan, specifically Samarinda, Tenggarong and Tanah Grogot. The findings reveal that since there is no obligation for the Judges to use the KHI, referring to the classical Islamic Jurisprudence when giving legal considerations and deciding cases of inheritance is not against the procedural law in Indonesia. Yet, this measure potentially creates the disparity of decisions in the Religious Courts since the fiqh differs in determining who the walad is: merely sons or include both sons and daughters. This has frustrated the objective of the KHI as the codification of Islamic Law in Indonesia which unites the differences of opinions in the fiqh and, thus, assures legal certainty in resolving the disputes. Hence, the government should enact the KHI as a Law in Indonesia in order to end the forum of choice for the Judges in basing their decisions so that the disparity of decisions in the Religious Court minimized and legal certainty assured for the justice seekers.*

**Keywords:** *Islamic inheritance law, Walad (child) concept in Islam, Compilation of Islamic Law, Jurisprudence.*

### **Abstrak**

*Artikel ini didasarkan pada kenyataan bahwa masih ada perbedaan keputusan di antara Hakim Pengadilan Agama tentang ahli waris, terutama anak (walad), ketika menangani sengketa warisan. Ini karena ada ketentuan umum tentang makna walad yang terkandung dalam Kompilasi Hukum Islam Indonesia (KHI) di mana itu mencakup anak laki-laki dan perempuan. Selain itu, tidak ada kewajiban bagi Hakim Pengadilan Agama untuk menggunakan KHI sebagai dasar untuk pertimbangan hukum, yang memungkinkan beberapa Hakim Pengadilan Agama untuk menggunakan fiqh sebagai dasar hukum dalam memutuskan suatu kasus. Artikel ini bertujuan untuk*

*menyelidiki dampak dari konsep umum walad (anak) dan langkah-langkah yang harus diambil Pemerintah untuk mengakomodasi bahan referensi hukum bagi para Hakim Pengadilan Agama, khususnya KHI dan fiqh . Artikel ini didasari oleh penelitian hukum normatif yang terutama meneliti keputusan Pengadilan Agama di Kalimantan Timur, khususnya Samarinda, Tenggarong dan Tanah Grogot. Temuan ini mengungkapkan bahwa karena tidak ada kewajiban bagi para Hakim untuk menggunakan KHI, merujuk pada Yurisprudensi Islam klasik ketika memberikan pertimbangan hukum dan memutuskan kasus-kasus warisan tidak bertentangan dengan hukum acara di Indonesia. Namun, langkah ini berpotensi menciptakan disparitas keputusan di Pengadilan Agama karena fiqh berbeda dalam menentukan siapa walad: hanya anak laki-laki atau termasuk anak laki-laki dan perempuan. Kondisi ini telah menggagalkan tujuan KHI sebagai kodifikasi Hukum Islam di Indonesia yang menyatukan perbedaan pendapat dalam fiqh dan, dengan demikian, memastikan kepastian hukum dalam menyelesaikan perselisihan. Oleh karena itu, pemerintah harus memberlakukan KHI sebagai UU di Indonesia untuk mengakhiri forum pilihan bagi para Hakim dalam mendasarkan keputusan mereka sehingga perbedaan keputusan di Pengadilan Agama diminimalkan dan kepastian hukum terjamin bagi para pencari keadilan.*

**Kata Kunci:** *Hukum Kewarisan Islam, Konsep Walad, Fikih, Kompilasi Hukum Islam, Yurisprudensi dan Putusan*

## **A. Introduction**

The general meanings of *walad* contained in the Compilation of Islamic Law (hereinafter referred to as KHI) has led to different interpretations among Religious Court Judges both at the first instance courts and the appeal courts. At least, there are 4 verses in the KHI that mention

the word "child";<sup>1</sup> yet, there is no further explanation about the gender status of the child in the verse, whether it is a boy or a girl.

In Islamic jurisprudence itself, the word *walad* has 2 different meanings, namely a boy only and both a boy and a girl. This difference starts from the varying interpretation of an-Nisa verse 176 among Ulama. The Majority of Ulama<sup>2</sup> interpret the word *walad* with a boy.<sup>3</sup> Hence, the definition of *walad* for *Jumhūr* Ulama is exclusively for boys. Ulama who differ in opinion with the Ulama *Jumhūr* is Ibn Abbas. Ibn Abbas interpreted *walad* in Q.S. An-Nisa verse 176 with boys and girls. In other words, Ibn Abbas interpreted the word *walad* in general.

The general statement of the child in the KHI is taken from the interpretation of Ibn Abbas stating that the child referred to in the Quranic verse of inheritance is both a boy and a girl. This is corroborated with the Supreme Court's ruling, namely Jurisprudence Number 86 K / AG / 1994 and Jurisprudence Number 184 K / AG / 1995, where both jurisprudences state that the child referred to in the KHI is a boy and a girl.

In practice, however, the Religious Court Judges do not necessarily hold on to such effective laws in Indonesia as the KHI or the Supreme Court's ruling, especially in the inheritance cases related to this *walad*. Some Judges choose to stick to classical *fiqh* rather than the KHI, as in some of the decisions that I will describe later. The KHI can be said as the Islamic jurisprudence of Indonesia. Even

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<sup>1</sup> "Kompilasi Hukum Islam" (n.d.) Art. 174 (2), p. 383, Art 180, 181, 182, p. 385.

<sup>2</sup> *Jumhūr* Ulama referred to here is al-Fuqaha as-Sab'ah consisting of Umar bin Khattab, Ali bin Abi Talib, Ayesha, Zaid bin Thabit, Abdullah bin Mas'ud, Abdullah bin Umar and Ibn Abbas, only Ibn Abbas here having a different opinion from the other Ulama related to the concept of *walad*. Ibnu Rusyd, *Bidayatul Mujtahid*, trans. Abu Usamah Fakhtur Rokhmah, Cet. 2 (Jakarta: Pustaka Azzam, 2011), 690.

<sup>3</sup> Syaikh Muhammad Ali Ash-Shabuni, *Shafwatut Tafasir Tafsir-Tafsir Pilihan*, trans. Yasin, Cet. 1, vol. 1 (Jakarta: Pustaka Al-Kautsar, 2011), 606.

though it is not a mandatory guideline to follow by the Sharia judges, the KHI has been used as a written regulation and as an initial guideline for the Religious Court Judges in deciding a case. This is expected to minimize the occurrence of disparities in decisions, so that in examining the same case can use the same rules.

Therefore, this article discusses the authority of KHI and *fiqh* as references and guidelines for Religious Court Judges in examining and deciding cases, especially inheritance cases related to the concept of *walad*. Further, it also analyzes the consequences arising from differences in the use of guidelines by Religious Court Judges in examining and deciding the case. This article will further confirm previous studies on the multiple authorities of Islamic law in Indonesia,<sup>4</sup> which have implications on the legal certainty for the justice seekers in the Religious Courts in Indonesia.<sup>5</sup>

## **B. *Kompilasi Hukum Islam: History and Authority***

The birth of Law No. 7 of 1989 concerning of the Religious Court confirmed the Religious Court as one of the judicial bodies in Indonesia. Despite its clear position, the Religious Court ironically does not have material law or unified applicable law to be referred to by the Judges and litigants. To overcome this problem, the Compilation of Islamic Law (*Kompilasi Hukum Islam*, hereinafter KHI) is enacted as an effective Islamic family law which will later be used as a basis for referencing every decision of the Religious Court.

The idea to write the KHI in Indonesia was first announced by the Minister of Religious Affairs, Munawir Sadzali, in February 1985 in his lecture in front of the

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<sup>4</sup> Alfitri, "Whose Authority? Contesting and Negotiating the Idea of a Legitimate Interpretation of Islamic Law in Indonesia," *Asian Journal of Comparative Law* 10, no. 2 (2015): 191–212, <https://doi.org/10.1017/asjcl.2016.1>.

<sup>5</sup> Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010).

Institut Agama Islam Negeri Sunan Ampel (IAIN Sunan Ampel, Sunan Ampel State Institute of Islamic Studies) students. Since then, this idea has rolled and received a warm welcome from various parties. Others say that this idea originated from Bustanul Arifin, the then Supreme Court Judge, who was inspired by Ibrahim Hosen's, the then MUI Chairman (Indonesian Ulama Council), book which discuss the Islamic Law Reform in Indonesia.<sup>6</sup>

The drafting of KHI began on March 25, 1985 after the Chief of Supreme Court and the Minister of Religious Affairs issued a joint decision concerning the appointment of a team for the Implementation of Islamic Law Development Projects through jurisprudence. Through this project, various *fiqh* books and decisions of the Religious Courts and the Religious High Court were studied, interviews with Indonesian Ulama were conducted, and comparative studies to several Muslim countries were done. The project was ended on February 2-5, 1988 with a workshop attended by Ulama, Jurists, Judges, scholars, and community leaders. The results of this workshop were finally known as the Indonesia.<sup>7</sup>

The KHI can be regarded as the rules of Islamic law that are in accordance with the conditions of legal requirements and legal awareness of Muslims in Indonesia. It is not a new school in Islamic jurisprudence, but rather the realization and application of various existing *fiqh* schools to answer various problems in Indonesia. In addition, the presence of KHI is expected to bring perfection to the development of the Religious Courts. Such perfection can only be achieved by providing a formal basis, namely legal certainty in the field of procedural law and in the power structure of the Religious Courts and legal certainty

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<sup>6</sup> Ahmad Imam Mawardi, "The Political Backdrop of The Enactment of The Compilation of Islamic Laws in Indonesia," in *Shari'a and Politics in Modern Indonesia*, by Arskal Salim and Azyumardi Azra (Singapore: Institute of Southeast Asian Studies, 2003).

<sup>7</sup> Moh Muhibbin and Abdul Wahid, *Hukum kewarisan Islam sebagai pembaruan hukum positif di Indonesia*, Cet. 1 (Jakarta: Sinar Grafika, 2009).

in the field of material law. With the KHI, now there is a codification of Islamic law to be referred to by the judges and justice seekers in resolving their disputes.<sup>8</sup>

However, the promulgation of the KHI is submitted to be a shortcut for it was passed by means of the Presidential Instruction (*Inpres*) instead of a statutory law. The Supreme Court has also stressed that the use of statutory law for this matter was very appropriate, given the challenges faced by bills of Islamic legislation in the Parliament. The use of the *Inpres* was an alternative following the result of a study between the Supreme Court, the Ministry of Religious Affairs, the State Secretary of State, and several legal experts which recommended that the KHI should be enacted with a plausible legal basis in order to forestall prolonged deliberation in the Parliament.<sup>9</sup> As a result, the KHI was pass through the Presidential Instruction No. 1 of 1991 which basically contained the President's instructions to the Minister of Religious Affairs to disseminate KHI consisting of: Book I concerning Marriage Law; Book II concerning the Law of Inheritance; and Book III about Islamic Trust. More specifically, KHI has 229 articles, 170 articles on Marriage Law, 44 articles on Inheritance Law including testaments and grants, 14 articles on Islamic trust and 1 more article on closing provisions that apply to all three legal groups.

Despite the controversy surrounding its promulgation, the KHI has been the first effort to codify Islamic law in Indonesia. It is needed to be the guideline for the Sharia judges in carrying out their duties so as to ensure the legal certainty exists in the decisions of the Religious Courts in Indonesia. Theoretically and practically in the Religious Courts, both written law (e.g. the marriage law and the KHI) and unwritten law (especially Islamic jurisprudence) have been employed by the Sharia Judges in resolving the

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<sup>8</sup> Muhammad Abdul Chalim, "Peradilan Agama Dan Kompilasi Hukum Islam Sebagai Pranata Hukum Nasional," *Pesantren* VII, no. 2 (1990): 35–36.

<sup>9</sup> Mawardi, "The Political Backdrop of The Enactment of The Compilation of Islamic Laws in Indonesia," 136–38.

disputes.<sup>10</sup> Despite the fact, the decisions are binding and observed by both parties; and when a case is brought in the Supreme Court, this cassation decision become a jurisprudence. In Indonesian legal system, the Jurisprudence is legally persuasive.<sup>11</sup> Hence, the KHI becomes a binding law by means of law in action in Indonesia.

### C. The Concept of *Walad* in Islamic Jurisprudence and the KHI

The concept of *walad* found in classical *fiqh* has 2 different interpretations, namely by *Jumhūr* Ulama and Ibn Abbas. The *Jumhūr* Ulama interpreted the word *walad* with only boys. The reason used by *Jumhūr* ulama in determining the meaning of *walad* was based on Ibn Mas'ud's hadith concerning the share of a daughter, a granddaughter of a deceased son, and a sister as a half, one sixth, and the rests subsequently.<sup>12</sup>

Besides, there is also another hadith used by the *Jumhūr* Ulama in explaining that the *walad* referred to in this case of inheritance is only a boy, namely from the hadith of Jābir ibn 'Abd Allāh concerning the share of Sa'an bin al-Rabi's daughter.<sup>13</sup> In this hadith, it is explained that the wife of Sa'ad ibn Rabī 'with her two daughters came to the Prophet Muhammad to complain about her husband's inheritance taken by the brother of Sa'ad ibn Rab '. Hearing this, the Prophet gave two-thirds of the inheritance of Sa'ad

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<sup>10</sup> See further discussion about this e.g Alfitri Alfitri, "The Role of Sharia Judges in Indonesia: Between The Common Law and The Civil Law Systems," *Mazahib* Vol. 16, no. 2 (August 30, 2017): 110–24, <https://doi.org/10.21093/mj.v16i2.825>; Nurlaelawati, *Modernization, Tradition and Identity*.

<sup>11</sup> Dadang Hermawan and Sumardjo Sumardjo, "Kompilasi Hukum Islam Sebagai Hukum Materiil Pada Peradilan Agama," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam* 6, no. 1 (August 16, 2016): 24–46, <https://doi.org/10.21043/yudisia.v6i1.1469>.

<sup>12</sup> Al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, Juz 8, Cet. 1 (Dār Ṭauq al-Najāh, 1422), 151.

<sup>13</sup> Ahmad Bin Hanbal, *Musnad Al-Imām Aḥmad Bin Ḥanbal*, Juz 23, Cet.1 (Muassasah al-Risalah, 2001), 108.



ibn Rabī 'to the two daughters, while for the wife or mother of children Sa'ad ibn Rabī' received an eighth part and the rest for uncle. Another reason proposed by the majority of Ulama is because of the patrilineal culture of the Arabs.<sup>14</sup> According to Hazairin, Arab society used to draw their lineage through the male pathway so that it emerged 'uṣbah-'uṣbah, bani-bani and so on, which in the end were all clans based on patrilineal lineages.<sup>15</sup>

As for Ibn Abbas, he has a different interpretation. This difference is triggered by the Qur'an, chapter an-Nisa verse 176 concerning "*Kalālah*" which reads:

*"They ask you a fatwa (about kalalah. Say:" Allah gave you a fatwa about kalālah (i.e.): if a person dies, and he has no children and has a sister, then for his sister that is half of the property he left behind, and his male brother destroys (all the property of his sister), if he does not have children, but if the sister is two, then for both of them two thirds of the property left by the deceased and if they (the heir consists of) brothers and sisters, so part of a brother as many as two sisters. Allah explains (this law) to you, so that you will not go astray. And Allah knows everything. "*

According to Ibn Abbas, the word "*walad*" in this verse includes boys and girls. Therefore, if the deceased has a daughter, then, Ibn Abbas aborted the part of the sister and handed over the remaining half of the inheritance to the heir who had the part of *aṣabah*, even though the lineage was far away.

Ibn Abbas's opinion is actually based on an understanding of *zhahir naṣ*, which if interpreted, a sister (not just a half-brother/sister from the mother's side) will get half of the estate's inheritance, if the deceased does not have children. Without a more detailed explanation of the

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<sup>14</sup> Suryati, *Hukum Waris Islam* (Yogyakarta: Penerbit Andi, 2017), 37.

<sup>15</sup> Hazairin, *Hendak kemana hukum islam?* (Jakarta: Tintamas Indonesia, 1970), 11–12.

boy or girl referred to in the paragraph, then how can the sister take half of the inheritance, even though the deceased leaves the child (a daughter)?<sup>16</sup>

The concept of *walad* in the KHI, however, is not explained clearly and in detail. Article 174(2), for example, states: "If all heirs are available, those who are entitled to inheritance are only: children, fathers, mothers, widows or widowers."<sup>17</sup> Thus, if the deceased leaves children, both boy and girl, as long as the heirs are available, the inheritance then becomes the property of the heirs mentioned above. In addition, Article 180 reads: "A Widow gets a quarter if the departed does not leave a child, and if the departed leaves a child, the widow gets an eighth part".<sup>18</sup> Based on the hadith referred to by the *Jumhūr Ulama*, the widow will get an eighth part if the deceased only leaves a daughter or more. However, there is no further explanation in the aforementioned Articles regarding the status of the child in question, whether it is a girl, a boy, or both. Likewise, Article 181 explains: "If someone dies without leaving a child and father, then the half-brother and sister from the mother's side each get one sixth part. If they are two or more people, they together get one third parts."<sup>19</sup> Similarly, Article 182 sets a rule that "If a person dies without leaving a child and father, while he has one biological sister or a half-sister from the father's side, then she gets half the portion. If the sister is with one or more biological sister or half-sister from the father's side, then they together get two-thirds. If the sister is with a biological brother or half-brother from the father's side, then the portion of the brother is two to one with the sister."<sup>20</sup>

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<sup>16</sup><https://badilag.mahkamahagung.go.id>., Abd. Salam, Pengembangan Makna "Walad" Pada Ayat Kewarisan Dalam Yurisprudensi(Kajian Sosiohistoris Fikih Kewarisan Klasik dan Kontemporer), Wakil Ketua Pengadilan Agama Sidoarjo, h. 6.

<sup>17</sup> The Compilation of Islamic Law, Art. 174 (2), h. 383.

<sup>18</sup> The Compilation of Islamic Law, Art. 180, h. 385.

<sup>19</sup> The Compilation of Islamic Law, Art. 181, h. 385.

<sup>20</sup> The Compilation of Islamic Law, Art. 182, h. 385.

Broadly speaking, the four articles above mention the word "child" without any explanation of its gender, i.e. boys or girls. Thus, the word "child" contained in the KHI is general in nature which covers both boys and girls.

#### **D. The General Concept of *Walad* in KHI and the Disparity of Religious Courts' Decisions**

##### 1. Four Case Laws of the East Kalimantan Religious Courts

The difference of decisions in Islamic inheritance disputes related to the meaning of "*walad*" occurred almost evenly throughout the Religious Courts in Indonesia. As mentioned earlier, this was triggered by the general concept of "*walad*" in KHI which indicates that "*walad*" is a boy and a girl. Besides, the position of KHI is not firm as a material law that must be referred by the Religious Courts judges and the Judges referring to classical *fiqh* books is the common practices in the Religious Courts in deciding cases. The *fiqh* scholars have differed in determining who was meant by "*walad*" in the verse of the Qur'an in question. Consequently, the judge who based his decision on the opinion of the *fiqh* stating "*walad*" was only a boy, would decide on the inheritance only for boys, and vice versa. The following section will be explained further four East Kalimantan Religious Courts' decisions related to inheritance disputes involving the definition of "*walad*" to show the dynamics that occur in the interpretation of judges of the concept of "*walad*":

##### a. Tenggarong Religious Court's Decision Number 0107/Pdt.P/2016/PA.Tgr

The decision is related to the case of the Appointment of Heirs submitted by 4 Petitioners on April 12, 2016. Petitioner I is the wife of the departed. Whereas Petitioners II, III and IV are children of the departed and Petitioner I, all of whom are female. During the witness examination, one of the questions put forward by the Panel of Judges to the second witness, who was none other than the inheritance

sibling, was whether the witness was willing not to be made an heir and to give his share to the Petitioners. This was done by the Panel of Judges to ensure that the witness was truly sincere to give his share to the heirs (the Petitioners). In his consideration, the Panel of Judges gave several points related to the case, one of which was "Referring to article 174(1) of the KHI, the terms and conditions of inheritance from the Petitioners have been fulfilled. "Based on these considerations, the Panel of Judges granted the petition and determined that the Petitioners were the legal heirs of the departed.<sup>21</sup>

b. Tenggara Religious Court's Decision Number 0327/Pdt.P/2016/PA.Tgr

In contrast to the previous case, only the children of the deceased who were women were involved in this case because the wife of the deceased or the mother of the petitioners had also died. In its consideration, the Panel of Judges used the KHI art. 171 letters (c), 172 and 174(1) KHI and then decided to grant the petition of this case.<sup>22</sup>

c. Samarinda Religious Court's Decision Number 40/Pdt.P/2017/PA.Smd

This case is about the application for appointment of heirs handled by the Religious Courts of Class IA Samarinda. The Petitioners contained in the application were the second wife of the deceased and his two biological daughters. During the trial, it was found the petition lacked of the *plurium litis consortium*<sup>23</sup> category because in addition to the

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<sup>21</sup> The Decision of Tenggara Religious Court, Decision Number 0107/Pdt.P/2016/PA.Tgr, h. 7-8

<sup>22</sup> The Decision of Tenggara Religious Court, Decision Number 0327/Pdt.P/2016/PA.Tgr, h. 6-7

<sup>23</sup>Plurium Litis Consortium is one form of error in person according to Yahya Harahap which means that the claim filed by less parties, namely the party acting as plaintiff or being withdrawn as a

Petitioners, the Panel of Judges argued that the deceased still had other heirs, the surviving sibling of the deceased. Based on this, the Panel of Judges concluded that the petition to determine the heirs was declared *Niet Ontvankelijke*<sup>24</sup> on the grounds of lack of parties.<sup>25</sup>

d. Tanah Grogot Religious Court's Decision Number 0359/Pdt.G/2016/PA.Tgt

The case of the Tanah Grogot Religious Court is contentious case a.k.a. a lawsuit. This inheritance lawsuit was submitted by 2 inheriting daughters to the second wife of the deceased (the stepmother of the Plaintiffs). Those who sued here were not only the two daughters but also all of the deceased's siblings. This is one of the arguments of the exception submitted by the Defendant. According to the Defendant, the siblings of the deceased did not have the capacity as the Plaintiff because they are not included in the class of heirs. The Panel of Judges granted the claim of the Plaintiffs in part, one of which was to determine the legal heirs of the heirs to only the Plaintiff I, Plaintiff II and the Defendant.<sup>26</sup>

The Defendant was dissatisfied and subsequently declared an appeal to the Samarinda Religious High Court. One of the contents of his

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defendant is incomplete, there are still people who must act as plaintiffs or be withdrawn by the defendant. See Bambang Sugeng A.S dan Sujayadi, *Pengantar Hukum Acara Percara dan Contoh Dokumen Litigasi*, (Jakarta: Prenadamedia Group, 2012), h. 52.

<sup>24</sup>Niet's decision *Ontvankelijke* (NO) is a verdict which states that the claim cannot be accepted because the claim contains a formal defect. This means that the lawsuit was not followed up by the Panel of Judges to be examined and tried so that there was no object of claim in the decision to be executed. See Sunarto, *Peran Aktif Hakim Dalam Perkara Perdata*, (Jakarta: Prenadamedia Group, 2014), h. 6.

<sup>25</sup> The Decision of Samarinda Religious Court Decision Number 040/Pdt.P/2017/PA.Smd, h. 14-15

<sup>26</sup> The Decision of Tanah Grogot Religious Court, Decision Number 0359/Pdt.G/2016/PA.Tgt, h. 105

appeal memory is the objection to the Grogot Land Religious Court's decision to reject the Defendant exception related to the participation of the deceased's siblings as Plaintiffs. According to the Defendant, they did not have the legal standing to be Plaintiffs and, therefore, the Tanah Grogot Religious Court has violated Article 174 KHI.<sup>27</sup>

Responding to the contents of the appeal, the Panel of Judges at the appeal court confirmed what was conveyed by the first-level Judge, because there was no basis stating that the deceased siblings did not have the legal standing to participate with other parties (Plaintiffs) in file a lawsuit. However, in determining who the heirs are entitled to the inheritance portion is the absolute authority of the Religious Courts in accordance with the purpose of Article 49 paragraph 3 of Law Number 7 Year 1989, which was amended by Law Number 3 of 2006 and amended again with Law Number 5 of 2009.<sup>28</sup> Furthermore, the Panel of Judges at the appeal court gave the same opinion as the first-level Judge who stated that the heirs of the deceased were Defendants as the Wife and Plaintiffs I-II as the children of the deceased. Meanwhile, Plaintiff III-VII as the siblings of the deceased did not receive the inheritance portion because it was blocked with the existence of the children.<sup>29</sup>

The legal considerations used by the Panel of Judges on appeal, however, are only based on Jurisprudence Number 184 K / AG / 1985 dated 30 September 1996 with legal abstraction that as long as there are children (both boys and girls) then the siblings of the deceased was blocked from their rights

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<sup>27</sup> The Decision of Samarinda Religious Court, Decision Number 45/Pdt.G/2017/PTA.Smd, h. 6

<sup>28</sup> The Decision of Samarinda Religious Court, Decision Number 45/Pdt.G/2017/PTA.Smd, h. 13-14

<sup>29</sup> The Decision of Samarinda Religious Court, Decision Number 45/Pdt.G/2017/PTA.Smd, h. 19-20

to inherit. Meanwhile, the first-level Judges not only used Jurisprudence Number 184 K / AG / 1985, but also used KHI as well as the opinion of one of the Chief Justice, A. Mukti Arto, as a legal consideration.<sup>30</sup>

In addition, the Panel of Judges at the appeal level also responded to the verdict of the first-level Judge regarding the share of children. The first-level Judges divided the parts of the girls into two-thirds respectively. Meanwhile, according to the Appellate Judges, the correct distribution is 2 allied daughters received 2/3, as stipulated in article 176 of the KHI.<sup>31</sup>In conclusion, in the decision of the Judge on the appeal level, there are several decisions that corroborate the verdict from the Tanah Grogot Religious Court, such as the participation of the deceased siblings as the Plaintiff and the determination of the legal heirs. However, there is also the decision of the Appellate Judge to change a number of decisions from the first instance Court, such as the procedure for distributing inheritance to the daughters, which by the Panel of Judges was considered to violate the provisions of article 176 KHI.

## 2. Analysis of the Courts Decisions

The meaning of *Walad* in the Islamic inheritance law in Indonesia is one of the most highlighted legal matters by various groups such as Judges, legal experts and Ulama. This is due to differences in interpretation between the classical Ulama, whose interpretation was divided into two, namely *Jumhūr* Ulama who interpret *Walad* as a boy only, and Ibn Abbas who interpret that *Walad* is a boy and a girl. In Indonesia, Islamic inheritance law is regulated in the KHI. In the KHI Book II, the word *walad* is still interpreted in general with

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<sup>30</sup> The Decision of Tanah Grogot Religious Court, Decision Number 0359/Pdt.G/2016/PA.Tgt, h. 97-98

<sup>31</sup> The Decision of Samarinda Religious Court, Decision Number 45/Pdt.G/2017/PTA.Smd, h. 20

"children" only. Hence, it leaves a forum of choice for Judges to interpret what is meant by "child" in the article. Although there has been a jurisprudence which states that the "child" referred to in KHI is a boy and girl child, it still causes disparity in the Judge's decision related to the Islamic inheritance law in Indonesia.<sup>32</sup>

The generality of the word "child" on the KHI has a quite negative impact on the decisions issued by the Religious Court from the aspect of legal certainty. This can be seen from the four decisions of East Kalimantan Religious Courts mentioned earlier. Of the four decisions, there is only one verdict that really refers to the KHI in deciding cases, namely the decision number 0327/Pdt.P/2016/PA.Tgr. In this decision, the parties, all of whom were the three daughters of the deceased, were declared as legal heirs. In the examination, the Panel of Judges only examined based on what was stated in the application letter without asking further about the other heirs, then the Panel of Judges decided the case in accordance with the provisions contained in KHI, namely if all heirs were still alive, then those who are entitled to become heirs are only fathers, mothers, widows, widowers and children. Where children are referred to here are boys and girls.<sup>33</sup> The other three decisions, namely the decision number 0107/Pdt.P/PA.Tgr/2016, the decision number 0327/Pdt.P/PA.Tgr/2016 and the decision number 0359/Pdt.G/2016/PA.Tgt are reluctant to use the concept of children on the KHI.

In the decision of the Tenggara Religious Court number 0107/Pdt.P/PA.Tgr/2016, even though the result of the decision was to grant the petition, namely the heirs were the wife and three daughters, only in the

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<sup>32</sup> See e.g. Euis Nurlaelawati, "Menuju Kesetaraan dalam Aturan Kewarisan Islam Indonesia: Kedudukan Anak Perempuan versus Saudara Kandung", *Indo-Islamika*, Vol. 2, No. 1 (2012), 75-90.

<sup>33</sup> The Decision of Tenggara Religious Court, No. 0107 / Pdt.P / PA.Tgr / 2016, h. 7-8, The Decision of Tenggara Religious Court, No. 0327 / Pdt.P / PA.Tgr / 2016, h. 6-7, The Decision of Tenggara Religious Court, No. 0107 / Pdt.P / PA.Tgr / 2016, h. 105.



examination process was found the fact that the Panel of Judges ask the deceased's brother to come and ask if the deceased's brother is willing to let go his share. Thus, the Panel of Judges who decided on this case were essentially still using the concept of children according to *Jumhūr* Ulama who interpreted children as boys only.<sup>34</sup>

In the decision of the Tanah Grogot Religious Court number 0359/Pdt.G/2016/PA.Tgt, the results of which also determined that the legal heirs were only two daughters and the second wife of the deceased. But in reality, there had been differences of opinion between the Judges. Two Judges used KHI, Jurisprudence and Ibn Abbas's interpretation in deciding this case, while another Judge used *Jumhūr* Ulama's interpretation in responding to this case. In the appeal level, the verdict from the Tanah Grogot Religious Court was reaffirmed by the Appellate Judges who tried themselves using legal considerations from Jurisprudence Number 184 K/AG/1985 to decide and determine the heirs of the deceased.

In the decision of the Samarinda Religious Court number 40/Pdt.P/PA.Smd/2017, it did not accept the application for the determination of the heirs submitted by the wife and two daughters of the deceased on the grounds of lack of parties. This illustrates that the Panel of Judges examining this case is guided by the concept of *walad* offered by *Jumhūr* Ulama, namely *walad*, which is interpreted as boys only.<sup>35</sup>

The disparity of decisions in examining this similar subject matter has led to a legal uncertainty for justice seekers despite the State's effort to eliminate it by promulgating the KHI. This disparity is proof that the law in Indonesia cannot materialize justice for justice seekers. As in case No.0359/Pdt.G/2016/PA.Tgt, even though the results of the decision stated that the heirs were the wife

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<sup>34</sup> According to the interview with one of heir's families who became witness in the court.

<sup>35</sup> The Decision of Samarinda Religious Court, Decision Number 040/Pdt.P/2017/PA.Smd, h. 14-15

and the two daughters, the brother of the deceased was not. There was a dissenting opinion between the Panel of Judges who decided the case. One of the Member Judges, Kastalani, revealed that the deceased's brother has the right to be an heir, because this is in accordance with the *Jumhūr* Ulama agreement which means the word *walad* with boys only, so that if the late father dies and only has a daughter, then the inheritance brother has the right to be an heir and get his rights. Kastalani, thus, refers to classical *fiqh* in examining and deciding the case.<sup>36</sup>

In addition, according to Kastalani J., the two daughters of the deceased were willing if his uncle (the deceased's brother) participated in becoming an heir. This can be seen from the inclusion of the inheritor brother as the parties in filing the lawsuit. Then, the jurisprudence<sup>37</sup> that is used as the opposing party (Defendant) as a basis for the opinion of those who reject the existence of Brother as heirs here, according to Kastalani, the jurisprudence does not provide justice for this case, even though the case is the same. . So that it will not give the same sense of justice for the parties.<sup>38</sup>The other two judges, however, held on to Ibn Abbas's interpretation of the concept of *walad* which states that *walad* is a boy and a girl. Thus, the existence of the deceased's brother is blocked or veiled by the deceased's daughter. In addition, these 2 Judges also argued that the existing jurisprudence can still be used for this case and still provide a sense of justice for the parties.<sup>39</sup> This difference of opinion occurred because the examining Judges had their own views on justice. Even

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<sup>36</sup> The Decision of Tanah Grogot Religious Court, Decision Number 0359/Pdt.G/2016/PA.Tgt, h. 98-99

<sup>37</sup> Jurisprudence No. 86 K/AG/1994 date 20<sup>th</sup> July 1955, Jurisprudence No. 122 K/AG/1995 dan Yurisprudensi Nomor 184 K/AG/1995.

<sup>38</sup> According to the interview with judge of Tanah Grogot Religious Court; Dr. Muhammad Kastalani, SHI., MHI.

<sup>39</sup> The Decision of Tanah Grogot Religious Court, Decision Number 0359/Pdt.G/2016/PA.Tgt, h. 97

though the Judges have the freedom in deciding cases, this freedom should not be out of a sense of justice. For Kastalani J., the sense of justice must be in accordance with the circumstances of the party so that the legal certainty that has been sought so far will be achieved.<sup>40</sup>

The existence of KHI is only as the initial guideline for Judges in examining and deciding a case and it is not something that must be followed by the Judges. Another examining judge in this case maintain that judges are even allowed to deviate from existing regulations to achieve a sense of justice itself. When the litigants want the Religious Court to decide according to the principle of justice they hold, the Judge must examine the case in accordance with the principle of justice followed by the litigants, especially for voluntary cases. This is because the Judge in the Religious Court must be passive, so that in examining a case, it must be in accordance with the contents of the request from the parties.<sup>41</sup> On contrary, Kastalani J. argued that not all parties understood the principle of justice they were following, so this is the duty of the Judge to provide a fair and appropriate way out for the parties without having to look at the principle they follow and the form of cases: voluntary or contentious.<sup>42</sup>

In essence, case examinations based on this school of thoughts of justice are not regulated in the procedural law of the Religious Courts either from the legal basis or from the principles of the procedural law. Because of that, KHI was formed as a guideline for Judges, to equate perceptions and opinions in deciding a case. Because if a Sharia judge follows the Islamic school of law (*mazhab*), then the decisions made will be varied. Hence, the Judges basically had the same purpose, namely to give a sense of justice to the parties who litigated.

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<sup>40</sup> According to the interview with judge of Tanah Grogot Religious Court; Dr. Muhammad Kastalani, SHI., MHI.

<sup>41</sup> According to interview with judge of Tenggarong Religious Court.

<sup>42</sup> According to interview with judge of Tanah Grogot Religious Court; Dr. Muhammad Kastalani, SHI., MHI.

### **E. *Fiqh* or KHI as the Basis of Sharia Judges' Considerations**

As mentioned earlier, the KHI is not a statutory law that must be followed by Judges. Its purpose is limited to be the initial guidelines for Judges in examining and deciding a case in the Religious Courts. A Sharia Judge has the right to refer to *fiqh* or other written law, for example, in lieu of the KHI. However, since both the KHI and classical *fiqh* books have become the legal sources referred to by the Sharia Judges, the disparity of decisions is unavoidable. Like the four decisions mentioned earlier, only 1 verdict that is truly informed by the KHI, namely in the decision Number 0327 / Pdt.P / 2016 / PA.Tgr. A verdict where the Panel of Judges checks the case based on the contents of the letter of application and makes the KHI article 174(1) a legal consideration in determining the legal heirs of the deceased.<sup>43</sup> It is called a verdict purely informed by the KHI because there was no dissenting opinion among the Panel of Judges in this decision. Further, there was no confirmation or question regarding whether or not the brother of the deceased was present or not.

This is different from the decision Number 0107/Pdt.P/ PA.Tgr/2016. Although it granted and stated that the legal heirs of the deceased were the Wife and the three daughters, in their examination it was found that the Judge asked the brother of the deceased to confirm whether the brother is content not to be made an heir and does not get his inheritance.<sup>44</sup> The confirmation from the Panel of Judges and the non-use of KHI article 174(2) as legal considerations illustrates that the Panel of Judges is still unsure of the concept of "child" used in KHI, so that even though the outcome of the decision is granted, it can be said that the Judge cannot depart from the opinion of *Jumhūr* Ulama whose opinion was not contained in the written regulations of the Religious Court, because this

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<sup>43</sup> The Decision of Tenggara Religious Court, Decision Number 0327/Pdt.P/2016/PA.Tgr, h. 6

<sup>44</sup> According to interview with family's heir

opinion was only found in classical *fiqh* books which became an unwritten law in the Religious Courts.

In the decision Number 0359/Pdt.G/2016/PA.Tgt., it also granted and stated that the legal heirs of the departed were only the wife and the two daughters. However, there was a dissenting opinion among the Judges; the dissent Judge argued that it would be better to use the opinion of *Jumhūr* Ulama in classical *fiqh* in examining the case. Meanwhile, the Chair of the Assembly and other Judges argued to use Ibn Abbas's opinion as stated on KHI to examine and decide on the case. The Judge's decision at the Tanah Grogot Religious Court was further reinforced by an appeal ruling issued by the Samarinda Religious High Court.

Last but not the least is the decision Number 40/Pdt.P/ 2017/PA.Smd. it did not accept the petition of the heirs, namely the wife and the two daughters of the departed. The legal considerations used by the Panel of Judges are due to a lack of parties. On the examination, the Panel of Judges questioned whether the heir had or still had relatives, and when the Panel of Judges found that they had, the Judge decided not to accept this case due to a lack of parties.<sup>45</sup> It is said that there are less parties because the inheritor's brother is not included by the other heirs as the party in submitting the request. In fact, if referring to KHI, the application is correct and the party submitting it is also appropriate. This means that the Panel of Judges examining the case prefers to use classical *fiqh* guidelines compared to KHI. This because if guided by the KHI, especially article 174(2), the party submitting the application is sufficient, namely the wife and the two daughters as per the article 174(2) "If all heirs exist, then those who are entitled to inheritance are only: child, father, mother, widow or widower". Considering the party submitting this application is the wife (widow) and the two daughters of the deceased, the request should be accepted

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<sup>45</sup> The Decision of Samarinda Religious Court, Decision Number 040/Pdt.P/2017/PA.Smd, h. 14

and granted because it is in accordance with the contents of article 174(2) of the KHI.

Table 1. Decision of Inheritance Case

<b>No.</b>	<b>Decision</b>	<b>Verdict</b>	<b>Legal Basis</b>
<b>1.</b>	107/Pdt.P/2016/PA.Tgr	Granted	KHI and Classical <i>Fiqh</i>
<b>2.</b>	327/Pdt.P/2016/PA.Tgr	Granted	KHI
<b>3.</b>	0359/Pdt.G/2016/PA.Tgt	Granted	KHI dan Classical <i>Fiqh</i>
<b>4.</b>	40/Pdt.P/2017/PA.Smd	Not Accepted (NO)	Classical <i>Fiqh</i>

From the table above, it can be seen that the use of Classical Jurisprudence has almost the same intensity as the use of KHI as the initial guideline of Religious Judges in examining a case. The absence of legal certainty regarding the main guidelines and references that should be used by the Judge is which raises serious problems on this issue. As long as the main guideline or reference for a Religious Court Judge has not been determined, there will be a very high chance of a disparity in decisions between Judges; let alone, considering the absence of a special law governing inheritance matters in Indonesia.

Hence, it would be better if the KHI becomes the main source and the main guideline that is obligatory for Judges in examining and deciding a case. This is intended to provide legal certainty and avoid any disparity in decisions between Religious Court Judges. One of the initial objectives of the establishment of the KHI is to avoid disparities that used to occur frequently among the Religious Court Judges? This goal has not been fully achieved because the uncertain status of the KHI is not included in the hierarchy of legislation. The same is true with Classical Jurisprudence, which is also not included in the hierarchy of legislation, but simply as unwritten

reference for the Judges of the Religious Courts. Because the status of KHI and Classical Jurisprudence is the same, namely together as a reference for the Religious Court Judge and there is no obligation to use it, the opportunity for disparity in decisions in the Religious Courts is still very large.

In addition to achieving legal certainty, making the KHI as a binding rule for inheritance disputes is relevant to the cultural context in Indonesia. Unlike some inheritance tradition; if someone dies, then the care of the child from the deceased is delegated to the deceased sibling. In Indonesia, there is such a culture in particular ethnic group, but there are also not in many others. Generally, it is very rare to find relatives of the deceased taking up the obligation to care for the child of the deceased. This is precisely what the KHI regulates about the meaning of a child concept in the inheritance law, which in turn will result in the other heirs being able or not to be able to inherit. It is only a matter of how to make the KHI a mandatory guideline for Religious Court Judges, so if this has been realized, the desire to obtain legal certainty will be achieved.

## **F. Conclusion**

The KHI, which was passed as the Presidential Instruction, is expected to be a guideline for the Judges of Religious Courts in deciding a case, so as to minimize the occurrence of disparities in decisions in the Courts. In Indonesia, KHI is also known as the national school of Islamic law. This is because the KHI adopts some rules of Islamic laws that already exist in classical *fiqh* books; yet, they were updated and developed to meet the contemporary conditions. In addition, Islamic law is codified as the KHI so as the community is not confused with the actual regulations effective in Indonesia. Here, legal certainty is expected to be materialized in the Religious Courts. However, the KHI is not a statutory law that must be followed by Judges. Its purpose is limited to be the initial guidelines for Judges in examining and deciding a case in

the Religious Courts. A Sharia Judge has the right to refer to *fiqh* or other written law, for example, in lieu of the KHI. However, since both the KHI and classical *fiqh* books have become the legal sources referred to by the Sharia Judges, the disparity of decisions is unavoidable.

From selected of case law analysis on the decisions of the Religious Courts on the matter of inheritance, it was found that the Religious Court Judges were not bound by the KHI. There was no obligation for Judges to decide cases in accordance with the KHI, because the KHI was not an obligatory guideline. Instead, the KHI was only the initial guideline recommended in examining and deciding cases in the area of the Religious Courts. Consequently, both the KHI and the classical *fiqh* have the same authority, because both are not included in the hierarchy of legislation. In fact, sometimes, the Religious Court Judges prefer to use the classical *fiqh* as a legal consideration in lieu of the KHI. To date, the Religious Courts Judges are still using the KHI and the classical *fiqh* in a balanced manner and when they find differences between the two, the Religious Court Judges will return to the principle of freedom and the principle of justice to examine and decide on the case. The question is then what really is the benchmark of the fair itself? Is justice intended for parties, judges or even laws? This is not an easy question to answer and need further investigation in separate papers.



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